
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/068

Judgment No.: UNDT/2019/079

Date: 10 May 2019

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

THIOMBIANO

v.

8. On 8 September 2015, the UNFPA Executive Director replied to the Applicant's MER indicating that the decision not to renew his FTA had been rescinded as it was not taken in in line with the terms of UNFPA's Separation Policy and that his FTA would be extended to enable management to appropriately assess his performance in line with UNFPA's procedures for performance appraisal and development (PAD).⁵

9. Following the UNFPA Executive Director's decision of 8 September 2015, the Applicant was notified of his FTA's extension, from 11 September 2015 to 29 February 2016, through a PAR on 17 September 2015.⁶

10.

Case No.:

extend his FTA from 1 to 31 March 2016 and from 1 to 30 April 2016 through his PAR which was forwarded to him on 6 April 2016. No irreceivability argument was raised in the management evaluation decision.

Merits

22. The Applicant maintains that his FTA with effect from 11 September 2015 had been automatically converted into a continuous appointment due to the lack of timely written notification of the renewal of the FTA which came only on 17 September 2015. The Applicant claims that this alleged procedural flaw automatically triggered the conversion of his FTA into a continuous appointment.

23. The Applicant points out to the prior practice of UNFPA whereby FTA notifications had been issued in advance of the date of expiration. He further points out that, under staff rule 9.4, an FTA expires automatically at a specified end date. UNFPA policy in respect to fixed term and continuing appointments, neither the one from 2009 nor the new one put in place in July 2016, did not determine specific conditions for conversion of fixed-term into continuing appointments and did not provide for the issuance of FTAs retroactively. There were no practical circumstances preventing the Organization from issuing a new FTA timely.

24. The 8 September 2015 management evaluation decision from the UNFPA Executive Director does not constitute an act of appointment. In any event, it did not specify the date until which his FTA would be extended. An email from human resources from 14 September confirms that the decision had yet to be taken. Whereas after the expiration of his FTA on 10 September 2015 he continued to render work under the same conditions, this situation legally amounted to an automatic conversion of his type of appointment. In such a situation, the Applicant relies on a holding of the French *Court de cassation* where a failure to issue a fixed-term contract timely resulted in its ineffectiveness.

25. The Applicant advances the same arguments in relation to his FTAs from 1 to 31 March 2016 and from 1 to 30 April 2016 through his PAR forwarded to him on 6 April 2016.

time necessary to appropriately assess his performance following the UNFPA PAD procedures. The Applicant received the UNFPA Executive Director's letter on 9 September 2015 and, accordingly, knew that his FTA would be extended until completion of his PAD procedures for 2015.

31. To implement the UNFPA Executive Director's decision of 8 September 2015, UNFPA tried to arrive at the most accurate estimate of the time necessary for management to appropriately assess the Applicant's performance following the PAD procedures in accordance with the PAD cycles for that year. UNFPA Management took six working days to assess such evaluation and estimated 29 February 2016. Following the decision of 8 September 2015, the Applicant was notified of the exact term of his FTA's extension, i.e. from 11 September 2015 to 29 February 2016, through his PAR on 17 September 2015.

32. The fact that the renewal of the Applicant's appointment was implemented by way of PAR was based on para. 16 of the FTA Policy which provides that renewals of fixed-term appointments are implemented by an appropriate personnel action, not by issuance of a new letter of appointment.

33. The Respondent's decision to renew the Applicant's FTA from 11 September 2015 until 29 February 2016 was taken to protect the Applicant's due process rights and, at the same time, to take into account the fact that the Applicant was notified of the exact term of his FTA's extension, i.e. from 11 September 2015 to 29 February 2016, through his PAR on 17 September 2015.

Alleg

A into a continuing appointment

35. The Applicant was notified in writing of the extension of his FTA prior to its initial expiration on 10 September 2015. The Applicant received the reply to his first MER on 9 September 2015 in which the UNFPA Executive Director concluded that the Organization would extend his appointment for the time necessary for management to appropriately assess his performance. Therefore, even if without indication of a specific duration, the Applicant had an explicit indication that his appointment would be renewed until completion of the PAD procedures directly by the UNFPA Executive Director.

36. Contrary to the Applicant's contentions, neither staff rule 9.4 nor staff regulation 4.3(c) support the perception that FTAs automatically convert into continuous appointments should the exact period of extension be communicated after their initial expiration date. Rather, staff rule 9.4 clarifies the time-limited nature of FTAs which automatically expire on their expiration day rather than being renewed or converted into any other type of contract.

37. The Organization's applicable legal framework does not provide for automatic conversions of FTAs into continuous appointments for alleged lack of written notification of an FTA extension. Conversions of FTAs into continuous appointments within the United Nations system are generally subject to strict requirements such as the highest standards of performance and subject to a comprehensive recommendation and approval process. This is reflected in staff rule 13.4 and ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009).

38. Contrary to the Applicant's averment, the email from the CO's Representative of 14 September 2015 did not leave the Applicant in uncertainty about the extension of his FTA. The same applies to the emails sent by the UNFPA system notifying the Applicant about the upcoming expiration of his FTA. Similar emails are automatically generated until the extension has been processed in the system.

39. The Applicant argues that it is the Organization's standard practice to notify its staff of the exact extension period prior to the FTAs initial expiration date and that the same supports the automatic conversion of his FTA into a continuous appointment. Neither the Staff Regulations and Rules nor UNFPA's policies and procedures prescribe specific requirements in this regard. While UNFPA aims not to extend FTAs with a retroactive effect, the same may be required in certain circumstances such as in the present case.

40. The Applicant supports his contention with a judgment from a French national Court. As consistently held by the Tribunal on several occasions, domestic law does not apply to and national jurisdiction is not binding to the United Nations including its subsidiary organs like UNFPA. Rather, the Applicant's terms and conditions of employment, like for any other staff, are governed by the Organization's rules and regulation and its related judicial system.

and from 1 to

30 April 2016 w/ 004005600405TF42 Tf1 0 0 1 99306421M 030 Apr19(fr)(om)571)59(to)lde.

Other matters raised by the Applicant

43. The Applicant has submitted allegations of misconduct, complaints of harassment or retaliation and similar allegations and/or complaints against the Organization. In this connection, the Respondent wishes to clarify that UNFPA has informed the Applicant on various occasions, such as by the UNFPA Executive Director's letter of 9 June 2016, that the merits of such allegations cannot be analyzed by the Organization in the course of a MER but should be addressed to specific, operationally independent offices of UNFPA established for that purpose. Accordingly, such allegations, complaints and other claims cannot be made subject to the Tribunal's decision whether the Respondent's administrative decisions were lawful.

44. The Respondent requests the Tribunal to reject the application in its entirety.

Considerations*Receivability*

45. The Tribunal agrees with the Respondent that the decision to extend the Applicant's FTA with effect from 11 September 2015 until 29 February 2016 is irreceivable because the Applicant failed to submit a request for management evaluation of the decision as required under staff rule 11.2(a) and art. 8.1(c) of the Statute of the Dispute Tribunal. Circumstances pertaining to this decision are considered solely as background for the main claim.

s FTA into a continuing appointment

46. For the reasons stated by the Respondent, the Tribunal finds no basis for the Applicant's claim that his appointment had been converted into a continuing one. The Tribunal recalls that, overall, continuing appointments are not granted as a matter of law but are subject to the fulfilment of eligibility criteria and to verification and approval processes. This rule is borne out by all the relevant instruments: staff rule 13.4; ST/SGB/2009/10; General Assembly Resolution

Case No.:

Conclusions

51. The application is irreceivable regarding the decision to extend the Applicant's FTA from 11 September 2015 until 29 February 2016;

52. In the remaining part the application is refused.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 10th day of May 2019